



Police Federation
of Australia

The National Voice of Policing

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**SUBMISSION FROM THE
POLICE FEDERATION OF AUSTRALIA TO
THE NATIONAL HUMAN RIGHTS CONSULTATION**

The Police Federation of Australia (PFA), representing Australia's 52,000 police officers, is pleased to present our preliminary views on the key questions being examined by the National Human Rights Consultation.

We note that your Terms of Reference require that 'the options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights'.

On that basis, the preliminary views we put forward assume that, at most, what might be developed is specific Commonwealth human rights legislation to operate alongside existing Commonwealth and State laws. Our submission is attached.

The PFA would be pleased to elaborate on our views if that would assist the consultation.

Yours sincerely

Mark Burgess
Chief Executive Officer

POLICE FEDERATION OF AUSTRALIA:

**SUBMISSION TO THE NATIONAL HUMAN RIGHTS
CONSULTATION**

INTRODUCTION

The Police Federation of Australia (PFA), representing Australia's 52,000 police officers, has a substantial interest in any proposal to introduce specific Commonwealth human rights legislation which would operate alongside existing Commonwealth, State and Territory laws. That substantial interest stems from police being responsible for law enforcement and community safety in each jurisdiction in Australia.

We note that your Terms of Reference require that 'the options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights'.

On that basis, the preliminary views we put forward assume that, at most, what might be developed is specific Commonwealth human rights legislation to operate alongside existing Commonwealth and State laws.

Regrettably, the *National Human Rights Consultation Background Paper*, 2008 provides very little guidance as to:

- what such Commonwealth human rights legislation might look like and what rights would be protected;
- how it might operate;
- what powers and responsibilities might fall to the Executive, the Parliament and the Judiciary; and
- what effect the scheme might have on public officials such as police officers.

Therefore, at this stage we are putting forward our preliminary views.

In the course of presenting our views, we indicate below areas that we believe will need to be examined and documented if this consultation process is to proceed to the next stage of a discussion paper setting out specific options for human rights legislation.

CURRENT HUMAN RIGHTS PROTECTIONS

Much of the public debate to date seems to have proceeded on the assumption that Australia does not presently have much in the way of human rights protections. As a consequence, it is argued that the Commonwealth needs to step in and introduce comprehensive human rights legislation.

On the contrary, in fact our constitution, statute law, ratified international law, and common law, variously at Commonwealth, State and Territory levels, include a range of vitally important human rights protections. These have been developed and evolved over the course of more than a hundred years. The result is that we have a reasonably well developed and widely understood body of law which has had the benefit of decades of refinement and enhancement by our Parliaments and statutory interpretation by our courts at various levels.

Among the human rights currently protected by these various means are:

- the right to trial by jury and a fair trial;
- freedom of religion;
- the right to fair compensation for the acquisition of property;
- the right to silence and protection against self-incrimination;
- the right to be presumed innocent until proven guilty;
- freedom of association;
- freedom of expression and political opinion;
- the right to equality of opportunity;
- the right not to be discriminated against by reason of sex, marital status, race, religion, disability, or age; and
- the right to privacy.

The PFA strongly supports these human rights protections.

It should be noted that police officers do not share all of these rights because legislation governing police put in place various scrutiny and accountability mechanisms as a counter-balance to police powers that are in place to protect the public interest.

In many instances, the human rights listed above are qualified or limited in varying degrees by other laws (and by statutory interpretations by the courts) in ways which balance those rights with the protections needed by society as a whole such as the need to protect national security, maintain law and order and protect public health. In other words, few of the human rights are absolute or unqualified.

Given the long established need to strike a delicate balance between the need to protect individual human rights and the need to protect the interests of society as a whole, it is our preliminary view that it would be unwise to comprehensively legislate for a tranche of human rights which might over-ride the societal interests protected by our laws.

It would assist informed discussion of this matter if a comprehensive account of the human rights currently protected under Australian law, and the qualifications and limitations attaching to them, were to form the foundation of any further consultation. Identifying the qualifications and limitations which apply is vitally important because it demonstrates to us all that delicate

balance that needs to be struck between individual protections and societal interests.

AN OVERARCHING HUMAN RIGHTS ACT

The most concerning aspect of an overarching Human Rights Act against which other existing legislation must be judged is that it means existing laws will on occasions need to be re-interpreted. This re-interpretation changes the meaning and application of existing laws in ways that we cannot know in advance (that is when a Human Rights Act is enacted). So legislation passed by our Parliaments with meaning debated, known and possibly interpreted by the courts potentially has a new and more limited meaning necessitated by the new human rights protections.

This situation arises because, based on human rights law models followed in the UK, Canada, NZ, the ACT and Victoria, a new human rights law, having set out the new statutory rights to be protected, then requires our courts to read and interpret pre-existing law (including common law) consistent with the human rights protections so far as possible. Where that is not possible, the judge can find the pre-existing law incompatible with the Human Rights Act.

The result of this approach is that:

- the meaning of existing law can change, for example by reducing protections for society as a whole in order to enhance individual rights;

or

- the pre-existing law will be declared incompatible and may need to be re-visited and revised by the executive and the legislature.

For example, coercive powers in national security laws requiring alleged suspects to answer police questions may be found to be incompatible with the right to silence or privacy. Parliaments have usually sparingly enacted such coercive powers for a good reason, namely the protection of society as a whole against pernicious risks of great harm or criminality or corruption by public officials, including police. It is not clear that the community would prefer an alleged criminal or corrupt official's right to silence to take precedence over protection of the community.

Is this kind of example fanciful? Another example is a UK case¹ where the House of Lords (acting as the highest court), in order to ensure the right to a fair trial under the *Human Rights Act 1998* (UK), re-interpreted legislation about rape such that the rape victim's previous sexual history became admissible in evidence.

¹ R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45.

The prospect of a new Human Rights Act changing the meaning of other laws through a process of statutory re-interpretation by judges is not something which the Police Federation of Australia would welcome. This is not simply because we are opposed to change, but more importantly that we put a high value on well thought out and considered legislation proposed by governments and enacted by Parliaments, and on the carefully determined balance between individual and societal interests.

In the UK, over a two year period after the *Human Rights Act 1998* came into effect, European Human Rights Convention rights are reported to have 'affected the outcome, reasoning or procedure in 318 cases out of 431 cases in the higher courts'.²

The end result of this process of re-interpretation of statute law in the light of new human rights law is that judges will be re-writing legislation.

In effect, the new Human Rights Act becomes a 'super Act' over-riding and potentially changing existing laws without any Government or Parliamentary process or scrutiny.

In answer to this concern, some argue that the courts have always had a role in interpreting statutes. That is so, but the courts would have a new role of reinterpreting and often 'reading down' existing statutes (including powers, obligations and limitations) in light of the new human rights.

It is this 'reading down' by un-elected judges that is of major concern to the PFA. We believe that striking the delicate balance between competing rights and responsibilities is something that should be the responsibility of democratically elected members of our Parliaments, not judges.

The PFA considers that in any future stage of this consultation the implications of any model Human Rights Act which is put forward should be clearly spelt out so that the public has a clear understanding of the changes that may result, including changes in the power relationship between governments, parliaments and judges.

POTENTIAL NEW HUMAN RIGHTS

One area where further enunciation of human rights may be warranted is in relation to the rights of the mentally ill to fair and humane treatment, and to not be restrained or incarcerated in unwarranted circumstances. However, this area demonstrates just how difficult it is to strike an appropriate balance between human rights on the one hand, and societal welfare and the welfare of the mentally ill. For example, police may be called upon to arrest and detain a mentally ill person who is an immediate threat to him or herself, or a member of the public. A simple expression of the human rights of the mentally ill is unlikely to strike the necessary balance.

² Lord Irvine, *The Impact of the Human Rights Act: Parliament, the Courts and the Executive*, [2003] *Public Law* 308.

REMEDIES AND COMPENSATION FOR BREACH OF HUMAN RIGHTS

Although recent human rights Acts do not always specify remedies for alleged breaches, the legislation in the Australian Capital Territory from 1 January 2009 does provide a direct right of action to the courts for people who claim their human rights have been breached. It remains to be seen whether this will lead to significant legal cases and claims for compensation.

Some commentators suggest that other Human Rights Acts which are silent on the question of available remedies and compensation for breaches leave the way open for judges to develop or find scope for both remedies and compensation much of which may fall to the taxpayer to ultimately fund.³ In New Zealand a scheme for compensation as a remedy has been judicially developed even though there is no entitlement to compensation under the NZ Act.

RELATIONSHIP BETWEEN COMMONWEALTH AND STATE LAWS

If the Commonwealth was to enact new human rights legislation, State and Territory laws would probably have to be interpreted in a manner consistent with the Commonwealth Act. Would State and Territory Governments and Parliaments be bound by a Commonwealth human rights ACT? These matters could have unintended consequences which should be considered before such a step is taken.

It needs to be recognized that very much of our law places limitations on rights and freedoms that individuals would otherwise have, and authorizes executive and administrative actions (including by police officers). These limitations have been imposed, and authorities granted, in the public interest as perceived over time. Those public interests and public policy purposes should not be overlooked.

POTENTIAL LIABILITIES OF POLICE OFFICERS

Of particular concern to the Police Federation of Australia, and our members, is the potential of a human rights Act to interfere with protections provided under existing Commonwealth, State and Territory laws for officers undertaking their duties.

In various jurisdictions, numerous statutes exclude police officers from liability they might otherwise face in the course of carrying out their duties lawfully. Police officers are faced with situations on a daily basis where, in upholding the law, they could be said to be infringing on the human rights of citizens.

³ See *Responsibility for Rights: the ACT Human Rights Act*, Carolyn Evans. *Federal Law Review*, 2004.

If a new human rights Act is to be proposed, it will be essential that it preserve the safeguards under other Commonwealth, State and Territory laws (and subordinate legislative instruments) protecting police (and possibly other public officials) from liability.

CONCLUSION

The PFA has formed preliminary views as follows:

1. By and large human rights are well protected in Australia by our strong democratic institutions, legal system, culture, supported by police services upholding law and order. The PFA strongly supports Australia's current system of human rights protections;
2. To the extent that any additional specific human rights need to be developed and protected, the government and the Parliament should proceed in an evolutionary way to enact specific legislation as they have done recently with privacy protection and the rights of same-sex couples not to be discriminated against;
3. It would be unwise to empower the nation's courts and judges to re-interpret or re-write existing laws in a manner consistent with human rights laws and thus enable a 'reading down' of other Australian laws;
4. Any further development of proposals for a comprehensive human rights law should set out the implications of such an approach, particularly for pre-existing laws, and the advantages and disadvantages of this course of action.
5. Any proposed Commonwealth Human Rights Act would need to include provisions to ensure that protections provided for police undertaking their lawful duties are safeguarded, including protection against liability for breach of human rights in the course of undertaking their lawful duties.
6. To further enhance human rights protections in Australia it would be preferable to strengthen the scrutiny of human rights by the Parliament and the Standing Committee for the Scrutiny of Bills.